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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1240

ISAAC T. RACKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 40–41) is reported at 159 F. 2d 702.

JURISDICTION

The judgment of the circuit court of appeals was entered February 19, 1947 (R. 41), and a petition for rehearing (R. 42–45) was denied March 14, 1947 (R. 45). The petition for a writ of certiorari was filed April 14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Petitioner did not except to the instructions to the jury, nor did he request additional instructions. With one exception, he challenged the propriety of the instructions for the first time in his petition for rehearing in the court below. The questions are whether, in these circumstances, his claims of error in the instructions are foreclosed and whether, in any event, there was error in the particulars urged in the petition.

STATUTE INVOLVED

The Act of July 2, 1940, c. 508, 54 Stat. 714, as amended, 50 U. S. C. App., Supp. V, 701, commonly known as the Export Control Act, provides in pertinent part:

> (a) The President is hereby authorized to prohibit or curtail the exportation of any articles, technical data, materials, or supplies, except under such rules and regulations as he shall prescribe.
>
> (b) Unless the President shall otherwise direct, the functions and duties of the President under this section shall be performed by the Foreign Economic Administration.
>
> (c) In case of the violation of any provision of any proclamation, rule, or regulation issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by

imprisonment for not more than two years, or by both such fine and imprisonment.

STATEMENT

On October 7, 1946, an indictment in five counts was returned against petitioner and others in the United States District Court for the Western District of Texas, charging in the first four counts that they violated the Export Control Act on four different occasions in March and April 1946 by attempting to export and exporting from the United States to Mexico, without proper permit and export license as required by law, certain tires, tubes and automobile casings, and in the fifth count that they conspired to violate the Act in that manner (R. 1–5).

After a trial by jury, petitioner was found guilty on all counts (R. 20, 21–22), and he was sentenced generally to imprisonment for 13 months on counts 1, 2 and 3, and 13 months on counts 4 and 5, the latter sentence to be cumulative with the sentence imposed on the first three counts (R. 24). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 41). The court stated in a *per curiam* opinion that

> * * * an examination of the record shows that none of the errors now claimed were in any manner, except in the motion for new trial, called to the attention of the trial court. This being so, unless the errors complained of are substantial and

> prejudicial and are apparent on the face of the record, the appeal presents nothing for our review. An examination of the record shows that this is not the case but that, on the contrary, no error is at all made to appear. * * * (R. 41.)[1]

ARGUMENT

Petitioner asserts, without any supporting argument, that his conviction should be reversed because the trial court committed five different errors in its instructions to the jury (Pet. 2–3). However, as the court below noted, none of the alleged errors was called to the trial court's attention before verdict.[2] Additionally, petitioner did not, except for the assertion that the instructions failed to define the elements of the offense, raise any of the claimed errors in the court below until he filed his petition for rehearing (cf. R. 32–33 and 42–44), and even then did not include one of his contentions here to the effect that the trial court erroneously failed to instruct the jury on accomplice testimony. In any event, petitioner's assertions of error are without merit.

1. Petitioner asserts that the trial court's instructions failed to define the elements of the

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[1] Petitioner did not include the evidence in the record on appeal, but designated, *inter alia*, only the trial court's instructions and the proceedings on his motion for a new trial (see R. 37–38). Consequently, it must be assumed that the proof supported the allegations of the indictment.

[2] At the conclusion of the charge to the jury, defense counsel made only one objection, not here relevant, and then withdrew it (see R. 18–19).

offenses with which he was charged (Pet. 2). In his petition for rehearing in the court below, he argued in support of this contention that (R. 42)

> * * * The Court referred to the law as "The Export Control Act of The Congress of the United States," and went no further in defining the law. The jury was nowhere told that the law provides for the issuance of permits by a certain governmental agency for the exportation of merchandise or commodities to Mexico, and that exporting or attempting to export merchandise or other commodities without securing a permit from that certain governmental agency, is the essance of the offense charged. * * *

The record refutes this contention, for the trial court early in its charge told the jury (R. 8, 9):

> You are charged by the Court as a matter of law that on and prior to the dates named in the indictment herein, from the period of March 26, 1946, to and including April 15, 1946, and during the period of time as charged in the conspiracy count of the indictment herein, under what is known and designated as the Export Control Act of the Congress of the United States of America, which was a war act and was then in force, and is still in force, it was made unlawful and a criminal offense against the United States to export merchandise from the United States into the Republic of Mexico, or elsewhere, of the nature charged in the

respective counts of the indictment herein, automobile tires and automobile tubes and casings, without having first secured a permit for the exportation of such merchandise and an export license for the exportation of the same.

* * * you are instructed by the Court any exportation of automobile tires and tubes, as charged in the respective counts of the indictment herein, without a permit having been issued for the same, and an export license, would be a violation of the criminal laws of the United States.

2. Petitioner contends that (Pet. 2) "It was a fundamental error for the Court to charge on the weight of the testimony. (Page 9, Tr. of Record.)." The disputed instruction is set out in the margin.[3] Petitioner's contention is based

[3] "* * * Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal. As applied to the facts in this case, gentlemen of the jury, that means simply this, that if any one here, as the defendant Rackley of the offenses charged in the first four counts of the indictment, and the defendant Gil as to the offenses charged in the third and fourth counts of the indictment, aided, abetted some one else or counseled with some one else, for instance as with the defendant Padilla *as the evidence would show here that conferences were had with him by the defendant Isaac T. Rackley, with Padilla*, and that it develops and you will recall the testimony and be governed by your recollection of same and not what the Court may say in this particular, if you believe it is shown by legal and competent evidence beyond a reasonable doubt that the defendant Isaac T. Rackley did confer with Padilla

upon that part of the instruction which we have italicized in our quotation (see petition for rehearing below at R. 43–44). However, immediately following this remark, the jury were told that they were to be governed by their own recollection of the testimony and not by what the court said and that it was for them to determine whether conferences were held and an understanding reached with respect to the unlawful exportations charged in the indictment. It is clear from the context that the court was merely referring to the evidence which the jury should consider in determining whether petitioner was an aider and abettor in the commission of the substantive offenses. In thus adverting to the evidence, the court was careful to admonish the jury that it

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and others in Juarez, who were interested in the importing into Mexico from the United States of tires, tubes and casings, as referred to in the respective counts of the indictment herein, and that as a result of such conferences that an understanding was reached with reference to the unlawful exportation of that merchandise into Mexico, as charged in the respective counts of the indictment herein, and without a permit having been issued, or license, for its exportation, then though some one individual, or some other individual, may have done the actual exportation, driven the car that contained merchandise of the character referred to over there as the result of conferences had and understandings had with Rackley and Padilla that the unlawful exportation of such tires was to be into Mexico, then the defendant who aided and abetted, induced or procured the bringing about of those matters would be as guilty of those offenses as if he himself had driven the car over there with the tires, tubes, and casings in the same." [Italics supplied.]

was exclusively their function to weigh the evidence and resolve the factual issues (see also R. 8, 11, 12, 17–18). And, moreover, it is elementary that a federal trial court may draw attention to and comment on the evidence which it deems important.

3. Petitioner also claims that the trial court's instructions required the jury to find him guilty on all four of the substantive counts, even though the evidence might have shown only a single violation, if any (Pet. 2). In support of this contention in his petition for rehearing in the court below (R. 43), petitioner cited the following excerpt from the instructions (R. 10):

> * * * if you believe and find that it is shown by legal and competent evidence beyond a reasonable doubt that the defendant Isaac T. Rackley did aid, abet, counsel, procure or induce, or that his actions were instrumental in or to a part in the transportation of such merchandise, exportation of such merchandise into Mexico, you will find a verdict of guilty as against the defendant Isaac T. Rackley as to each of the offenses charged in each one of the respective first four counts of the indictment, the first, second, third, and fourth counts thereof. * * *

It is evident, however, that in this instruction, as in the immediately preceding instruction as to aiding and abetting quoted in footnote 3, *supra*, pp. 6–7, the court had reference to petitioner's part

in each of the exportations charged in the first four counts, and that as to each of those transactions the jury was to determine whether petitioner participated as an aider and abettor. Although the court referred generally to the tires and tubes involved in the four counts as "merchandise" and to the "exportation of such merchandise" to Mexico, the jury could not possibly have thought, in the light of the full context of the instruction here challenged, that a finding of guilt as an aider and abettor as to one of the shipments would require a similar finding as to the others, especially since the court had just referred to the necessity of determining whether "an understanding was reached [between petitioner and others] with reference to the unlawful exportation of that merchandise into Mexico, as charged in the respective counts of the indictment herein," i. e., the first four counts (R. 9–10).

Moreover, although the evidence is not included in the record, the trial court's instructions indicate that there was no dispute as to the exportations charged in the first four counts or that petitioner participated in those transactions, and that the only issue raised by his defense was whether his participation was as an informer acting on behalf of the Government or as an aider and abettor in the commission of the offenses (see R. 10–11). In such a setting, the disputed instruction obviously could not have misled the jury, as petitioner contends.

4. Petitioner asserts that the trial court's instruction with respect to his defense that he was acting as an informer "is not the law" (Pet. 2). The challenged instruction is set out in the margin.[4] In his petition for rehearing in the court below, petitioner argued that this instruction was erroneous in that it required the jury to find, before they could acquit him on his defense, that there was a specific prior understanding between him and government officers that he would act as an informer with respect to the "identical" offenses charged in the indictment (R. 44). Apparently petitioner's point is that a general purpose to undertake to act as an informer, without any prior advice to or understanding with gov-

[4] "* * * On the other hand, gentlemen of the jury—and the defense of the defendant Isaac T. Rackley runs alike perhaps, and that is a matter for your determination, as to the offenses charged against him in each one of the respective counts of the indictment herein, that he was in truth and in fact acting as an informer, acting in good faith in the interest of the Government with reference to the exportation into Mexico of this merchandise as charged in the respective four counts of the indictment herein, automobile tires, casings and tubes—not that he was merely perhaps used by the Government as an informer at that time in various matters, but that he was being used by the Government as an informer seeking to detect violations of the character as charged in the four respective counts of the indictment herein, he was acting in good faith in that particular, not acting to aid Padilla or Torres, or those that might be interested in getting tires from the United States over into Mexico—and that is a matter, gentlemen of the jury, and the controlling matter perhaps for your determination in this case. The Court

ernment officers, is sufficient to exculpate a person charged with crime. However this may be, the defense was pertinent only as bearing upon the issue of petitioner's intent. And on this score, the trial court's instruction was clearly as much as he was entitled to, for the court in plain terms told the jury that they should acquit him if they found that he was in fact, "as he considered," acting as an informer in the interest of the United States in respect of the matters charged in the indictment.

5. Petitoner's final contention is that "It was fundamental error for the trial court to fail to charge the jury in appropriate terms on accomplice testimony upon which the Government relied

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will say it is the controlling matter for your determination in this case, because that is the defendant's defense in this case. That is a matter you must resolve and determine yourselves from the evidence, whether, with reference to these particular matters as charged in the four counts of the indictment herein, he was an informer or not, acting in truth and in fact in the interest of the United States, as he considered, and as you would conclude from the facts, then if he was he should be acquitted of the offenses as charged in the respective four counts of the indictment herein, because if one in truth and in fact was acting as an informer of the United States Government, and what he did in conferring with Padilla and with others, as the evidence shows in this case he was doing, that as an informer of the Government, acting in the interest of the Government, and that was his intention and purpose at that time, he could not enter into any unlawful combination because he would be innocent of that fact because he was acting as an agent of the Government; * * *." (R. 10-11.)

for conviction" (Pet. 3). Admittedly, the instructions to the jury, as set forth in the record, do not contain any charge in respect of accomplice testimony. However, there is nothing in the record to show that accomplice testimony was used or, if so, to what extent and effect. And, moreover, the giving of a cautionary instruction on such testimony rests in the discretion of the trial court.[5] Here, so far as the record shows, there was not even a request for such an instruction (see R. 18–19).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] See, e. g., *Pine* v. *United States*, 135 F. 2d 353, 355 (C. C. A. 5), certiorari denied, 320 U. S. 740; *United States* v. *Block*, 88 F. 2d 618, 621 (C. C. A. 2); *United States* v. *Becker*, 62 F. 2d 1007, 1009 (C. C. A. 2).

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